

**UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER**

United States of America, Complainant vs. Ralph Sanchez, Labor Contractor Respondent; 8 U.S.C. Section 1324a Proceeding; Case No. 88100131.

Appearances: ROBERT YEARGIN, Esq., of San Francisco, CA, for the Complainant.

GILBERT D. LOPEZ, Esq., of Fresno, CA, for the Respondent.

SUMMARY DECISION AND ORDER

On October 3, 1988, a Complaint Regarding Unlawful Employment was filed against Ralph Sanchez, Labor Contractor, herein called Respondent, by the United States of America, through the Department of Justice, Immigration and Naturalization Service, herein called the Complainant, pursuant to 8 U.S.C. Section 1324a. Attached thereto and incorporated therein is a Notice of Intent to Fine, herein called the Notice, which had previously been served upon Respondent, by mail, on August 31, 1988. A Notice of Hearing issued on October 13, 1988, setting this matter for hearing on February 21, 1989. Thereafter, the parties commenced discovery proceedings which led to Complainant filing a Motion to Amend the Complaint to reflect information obtained during the discovery process. Absent any opposition, the Motion was granted. Respondent filed a timely Answer to the Complaint.

On February 1, 1989, Complainant filed a Motion For Summary Judgment upon the grounds that there is no genuine issue as to any material fact. In support of the Motion for Summary Judgment, Complainant submitted Respondent's answers to Complainant's first Request for Admissions, a Joint Statement of Agreed Facts and the alleged improperly completed Forms I-9. Respondent filed no response to Complainant's motion, but signed the Joint Statement of Agreed Facts submitted by Complainant.

Ruling on Motion for Summary Judgment

Section 68.6(c)(1) of the Interim Final Rules of Practice and Procedure¹ provides that any allegation not expressly denied in the Answer shall be deemed to be admitted. Section 68.6(c)(2) of the Rules provides that the Answer shall include a statement of the facts supporting each affirmative defense. Section 68.36 of the Rules provides:

(a) any party may . . . move with or without supporting affidavits for a summary decision on all or any part of the proceeding. Any other party may, within ten (10) days after service of the motion, serve opposing papers with affidavits, if appropriate, or countermove for summary decision. . . .

* * * * *

(c) The Administrative Law Judge may enter summary decision for either party if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision.

Section 68.1 of the Rules provides that the Rules of Civil Procedure for the District Courts of the United States shall be applied in any situation not provided for or controlled by the Interim Final Rules, or by any statute, executive order or regulations. Thus, it is appropriate, in considering the standards for granting a Motion for Summary Decision under Section 68.36, to look to rule 56 of the Federal Rules of Civil Procedure, which relates to summary judgments, and the cases with regard thereto.

The Supreme Court has stated that the purpose of the summary judgment procedure is to avoid an unnecessary trial when there is no genuine issue as to any material fact, as shown by the pleadings, affidavits, discovery, and judicially-noticed matter. Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 2555, 91 L.Ed.2d (1986). A material fact is one which affects the outcome of a hearing. Anderson v. Liberty Lobby, 477 U.S. 242, ----, 106 S.Ct. 2505, 2510, 91 L.Ed.2d (1986). If no genuine issue of material fact and no defense exists in the case, the complainant is entitled to summary judgment as a matter of law when it has set forth a prima facie case in its pleadings upon which relief may be granted. See Rawdon v. United States, 364 F.2d 803 (C.A. 9, 1966) cert. denied, 386 U.S. 909 (1967); United States v. Leitner, 86 F, Supp. 628 (N.D. Cal. 1949) aff'd, 184 F.2d, 216 (C.A. 9, 1950).

Upon a full consideration of the pleadings and the affidavits and exhibits submitted in support of Complainant's Motion for Summa-

¹52 Fed. Reg. 44971-44985, November 24, 1987, pp. 44975 (to be codified at 28 C.F.R. Part 68).

ry Judgment, I conclude there is no genuine issue as to any material fact and the Complaint is sufficiently particularized to support a Summary Decision. Accordingly, Complainant's Motion for Summary Judgment is granted. Upon the entire record, I make the following:

Findings of Fact

The Immigration Reform and Control Act of 1986, herein called IRCA, establishes several major changes in national policy regarding illegal immigrants. Section 101 of IRCA amends the Immigration and Nationality Act of 1952, herein called the Act, by adding a new Section 274A (8 U.S.C. 1324a) which seeks to control illegal immigration into the United States by the imposition of civil liabilities, herein referred to as employer sanctions, upon employers who knowingly hire, recruit, refer for a fee or continue to employ unauthorized aliens in the United States. Essential to the enforcement of this provision of the law is the requirement that employers comply with certain verification procedures as to the eligibility of new hires for employment in the United States.

Sections 274A(a)(1)(B) and 274(b) provide that an employer must attest on a designated form that it has verified that an individual is not an unauthorized alien by examining certain specified documents to establish the identity of the individual and to evidence employment authorization. Further, the individual is required to attest, on a designated form, as to employment authorization. The employer is required to retain, and make available for inspection, these forms for a specified period of time. Form I-9 is the form designated for such attestations. Section 274A(e)(5) provides for the imposition of a civil penalty of not less than \$100 and not more than \$1,000 for each individual with respect to whom a violation of 274A(a)(1)(B) occurred.

The Amended Complaint alleges that Respondent violated Section 274A(a)(1)(B) of the Act by:

(1) Failing to prepare the Employment Eligibility Verification Form (Form I-9) for the following employees hired for employment in the United States on the dates set forth opposite their respective names:

Count

1. Vicente Gaspar-Pascual--May 3, 1988.
2. Mario Manuel-Lopez--May 3, 1988.
3. Luis Esteban-Esteban--May 3, 1988.
4. Celestino Chun-Morales--May 3, 1988.
5. Gaspar Sebastian-Gaspar--May 3, 1988.
6. Martin Santamaria-Hernandez--June 22, 1988.

7. Jose N. Rico-Jimenez--June 22, 1988.
8. Noe Estrella-Galvin also known as Noe Estrada-Galvin--
June 22, 1988.
9. Adrian Hernandez-Noriega--June 22, 1988.
10. Miguel Pineda-Cisneros--June 22, 1988.
11. Jose Delgado-Barrajas--on or after March 2, 1988.
12. Javier Diaz-Perez--June 22, 1988.
13. Reynol Pastor-Carbajal--July 10, 1988.
14. Lucio Pastor-Avila--July 10, 1988.
15. Claudio Flores-Limus--July 10, 1988.
16. Adelfo Pastor-Carbajal--July 10, 1988.
17. Jose A. Dominguez-Meraz--August 2, 1988.
18. Juan Lopez-Ruiz--August 1, 1988.

(2) Accepting, to establish the employment eligibility of the following employees hired for employment in the United States, on the dates set forth opposite their respective names, individual fee register receipts which are not documents acceptable under 8 C.F.R. 274a.2(b)(1)(v) to establish employment eligibility.

Count

19. Blas Bautista-Olivares--on or after November 7, 1986.
20. Saturnino Rodriguez-Dias--on or after November 7, 1986.
21. Jesus Munoz-Villalobos--on or after November 7, 1986.

(3) Failing to record a document number in List B of the Employment Forms I-9 and to sign the certification in Section 2 of the Forms I-9 for the following employees hired, on the date set forth opposite their respective names, for employment in the United States.

Count

22. Manuel Lopez-Rivera--June 20, 1988.
23. Jose Aguirre-Rivera--June 20, 1988.
24. Martin Rodriguez--June 20, 1988.
25. Roberto Segoviano-Trujillo--June 20, 1988.
26. Ramon Aguirre-Rivera--June 20, 1988.
27. Luis Rodriguez-Lopez--June 21, 1988.
28. Rigoberto Rivas--June 20, 1988.

(4) Failing to record a document number in List B of the Forms I-9 for the following employees hired, on the date set forth opposite their respective names, for employment in the United States.

Count

29. Javier Salgado-Roman--June 21, 1988.
30. Roberto Segobiano-Aguirre--June 21, 1988.
31. Gerardo Aguirre-Segoviano--June 20, 1988.

32. Aurelio Rodriguez--June 20, 1988.
 33. Sergio Rodriguez-Trujillo--June 20, 1988.

The documents submitted by Complainant establish that Respondent failed to prepare or properly complete Forms I-9 as alleged in the Complaint. Respondent admits such failure but argues that Respondent was not required to prepare Forms I-9 for its employees since they were engaged in seasonal agricultural services with regard to such employment, and Respondent was therefore exempt from the employer sanctions provisions of IRCA prior to December 1, 1988. Respondent further argues, as affirmative defenses, that the Complaint fails to allege the country of origin of the named employees and that Complainant has failed to make named employees available to Respondent for their depositions and statements or to determine their citizenship status.

The parties agreed in the Agreed Statement of Facts that at the times relevant herein, employees of Respondent were engaged in clearing brush from around small pine trees and planting trees in a national forest pursuant to a contract between Respondent and the U.S. Forest Service. They further agree that enforcement of employer sanctions provisions of the Act with respect to employment of an individual in seasonal agricultural services was deferred until December 1, 1988.²

Since the conduct alleged in the Complaint occurred prior to December 1, 1988, a threshold question is whether Respondent was engaged in seasonal agricultural services. Section 274A(i)(3)(C)(ii) provides that for purposes of Section 274A(i)(3) ``seasonal agriculture services'' is defined in Section 210(h).³

That section provides:

``(h) Seasonal Agricultural Services Defined.--In this section, the term `seasonal agricultural services' means the performance of field work related to planting, cultural practices, cultivating, growing and harvesting of fruits and vegetables of every kind and other perishable commodities, as defined in regulations by the Secretary of Agriculture.''

Respondent's work in clearing brush and planting trees in national forests is clearly not related to fruits and vegetables since those terms refer to edible plant products.⁴ ``Other perishable commodities'' is defined by the Department of Agriculture at 7 C.F.R., 1d.7. That section provides:

§ 1d.7 Other perishable commodities.
 ``Other perishable commodities'' means those commodities which do not meet the definition of fruits and vegetables, that are produced as a result of seasonal

²See Section 274A(i)(3)(A), 8 U.S.C. 1324a(i)(3)(A).

³8 U.S.C. 1160(h).

⁴See 7 C.F.R. part id.5 and id.10.

field work, and have critical and unpredictable labor demands. This is limited to Christmas trees, cut flowers, herbs, hops, horticultural specialties, Spanish reeds (arando donax), spices, sugar beets, and tobacco. This is an exclusive list, and anything not listed is excluded. Examples of commodities that are not included as perishable commodities are animal aquacultural products, birds, cotton, dairy products, earthworms, fish including oysters and shellfish, forest products, fur bearing animals, and rabbits, hay and other forage and silage, honey, horses and other equines, livestock of all kinds including animal specialties, poultry and poultry products, sod, sugar cane, wildlife, and wool. [emphasis added]

Thus, forest products are specifically excluded from the category of ``other perishable commodities.'' Since the employees named in the complaint do not perform field work related to fruit and vegetables or other perishable commodities they are not employed in seasonal agricultural services. I therefore find that Respondent was not exempt from the employer sanctions proceedings and penalties of Section 274A(a)(1)(B).

I further find no merit in Respondent's other contentions. Both country of origin and citizenship status are irrelevant to any consideration of alleged 274A(a)(1)(B) violations since the paperwork requirements of Section 274A(a)(1)(B) and 274A(b) apply to all employees regardless of citizenship status or country of origin. As to the alleged failure to make named employees available for depositions, Respondent has not initiated any discovery proceedings.

For the foregoing reasons, I conclude that Complainant has established a prima facie case which has not been controverted by Respondent and that Respondent has not established a viable defense. Accordingly, I find that Respondent has violated Section 274A(a)(1)(B) of the Act as alleged, 8 U.S.C. Section 1324a(a)(1)(B).

Conclusions of Law

1. Respondent has violated Section 274A(a)(1)(B) of the Immigration and Nationality Act (8 U.S.C. 1324a(a)(1)(B) by:

(a) Failing to prepare the Employment Eligibility Verification Form (Form I-9) for each of the following employees, all of whom were hired by Respondent, after November 6, 1986, for employment in the United States.

Vicente Gaspar-Pascual
 Mario Manuel-Lopez
 Luis Esteban-Esteban
 Celestino Chun-Morales
 Gaspar Sebastian-Gaspar
 Martin Santamaria-Hernandez
 Jose N. Rico-Jimenez
 Noe Estrella Galvin also
 known as Noe Estrada-Galvin
 Adrian Hernandez-Noriega

Miguel Pineda-Cisneros
 Jose Delgado-Barrajas
 Javier Diaz-Perez
 Reynol Pastor-Carbajal
 Lucio Pastor-Avila
 Claudio Flores-Limus
 Adelfo Pastor-Carbajal
 Jose A. Dominguez-Meraz
 Juan Lopez-Ruiz

(b) Accepting after November 6, 1986, to establish the eligibility for employment in the United States of the following employees, individual fee register receipts for an amount usually paid by an individual to apply for the Amnesty Program under the INS:

Blas Bautista-Olivares
Saturnino Rodriguez-Dias
Jesus Munoz-Villalobos

(c) Failing to record a document number in List B of the Forms I-9 and to sign the certification in Section 2 of the Forms I-9 for the following employees, all of whom were hired by Respondent after November 6, 1986 for employment in the United States:

Manuel Lopez-Rivera
Jose Aguirre-Rivera
Martin Rodriguez

Luis Rodriguez-Lopez
Ramon Aguirre-Rivera
Rigoberto Rivas

(d) Failing to record a document number in List B of the Forms I-9 for the following employees, all of whom were hired by Respondent after November 6, 1986 for employment in the United States:

Javier Salgado-Roman
Roberto Segobiano-Aguirre
Gerardo Aguirre-Segoviano

Aurelio Rodriguez
Sergio Rodriguez-Trujillo

Civil Penalties

Since I have found violations of Section 274(a)(1)(B) of the Act, assessment of civil money penalties is required by the Act. Section 274a(e)(5) states:

(5) ORDER FOR CIVIL MONEY PENALTY FOR PAPERWORK VIOLATIONS. With respect to a violation of subsection (a)(1)(B), the order under this subsection shall require the person or entity to pay a civil penalty in an amount of not less than \$100 and not more than \$1,000 for each individual with respect to whom such violation occurred. In determining the amount of the penalty, due consideration shall be given to the size of the business of the employer being charged, the good faith of the employer, the seriousness of the violation, whether or not the individual was an unauthorized alien, and the history of previous violations.

The Complaint seeks a penalty of \$500 for the violations found with regard to each of the eighteen employees named in subparagraph 1(a) of the ``Conclusions'' herein; and \$300 for the violations with regard to each of the fifteen employees named in subparagraphs 1(b), 1(c) and 1(d) of the ``Conclusions'' herein; for a total of \$13,500. None of these individual amounts are outside the statutory limits. Since Respondent has failed to assert any mitigating circumstances and the penalties requested do not appear unreasonable on their face, I find the total fine in the amount of \$13,500 to be appropriate.

ORDER

IT IS HEREBY ORDERED that:

1. Respondent pay a civil money penalty of \$500 for each of the eighteen violations with regard to the failure to prepare the Employment Eligibility Verification Forms (Form I-9); and \$300 for each of the fifteen violations with regard to failing to properly complete the Forms I-9 or with regard to accepting, to establish employment eligibility, documents not acceptable for that purpose under 8 C.F.R. 274a.2(b)(1)(v); for a total of \$13,500.

2. The hearing previously continued indefinitely is cancelled.

3. This Summary Decision and Order is the final action of the Administrative Law Judge in accordance with Section 68.51(b) of the Rules as provided in Section 68.52 of the Rules, and shall become the final order of the Attorney General unless, within thirty (30) days from the date of this Summary Decision and Order, the Chief Administrative Hearing Officer shall have modified or vacated it.

Dated: May 24, 1989.

EARLDEAN V.S. ROBBINS
Administrative Law Judge